FOR ARGUMENT

No. 76-911

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

ADAMO WRECKING CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

On August 7, 1977, the President signed the Clean Air Act Amendments of 1977, Pub. L. 95-95, 91 Stat. 685. These amendments make it clear that the Administrator of the Environmental Protection Agency has the authority to control hazardous air pollutants by promulgating work practice standards as well as by issuing numerical limitations upon emissions.[1] Section 110 of the amendments provides:

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[1]Section 305(c) of the amendments also makes some changes in Section 307(b) of the Act, which governs judicial review. Section 305(c)(3) extends from 30 to 60 days the time within which to seek review in the District of Columbia Circuit. These changes do not affect the present case.

Section 112 of the Clean Air Act is amended by adding the following new subsection at the end thereof:

"(e)(1) For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce an emission standard for control of a hazardous air pollutant or pollutants, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which in his judgment is adequate to protect the public health from such pollutant or pollutants with an ample margin of safety. In the event the Administrator promulgates a design or equipment standard under this subsection, he shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

"(2) For the purpose of this subsection, the phrase 'not feasible to prescribe or enforce an emission standard' means any situation in which the Administrator determines that (A) a hazardous pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.

"(3) If after notice and opportunity for public hearing, any person establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions

of any air pollutant at least equivalent to the reduction in emissions of such air pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

"(4) Any standard promulgated under paragraph (1) shall be promulgated in terms of an emission standard whenever it becomes feasible to promulgate and enforce such standard in such terms.".

We have discussed at pages 32-33 and note 22 of our brief the legislative history of this provision in the Senate. The Conference Committee added only a few comments (H.R. Conf. Rep. No. 95-564, 95th Cong., 1st Sess. 131-132 (1977)):

HAZARDOUS DESIGN STANDARDS

House bill

No comparable provision.

Senate amendment

Amends section 112 of existing law to specify design, equipment, or operational standards for the control of a source of hazardous emissions, where an emission limitation is not possible or feasible to measure hazardous emissions or to capture them through appropriate devices for control.

Conference agreement

The House concurs in the Senate provision with an amendment to clarify that the Administrator may specify a hazardous design standard if the emission of hazardous pollutants through a conveyance designed to emit or capture such pollutants would be

inconsistent with any Federal, State or local law and minor clarifying modification in the language.

The language in this section with respect to technological or economic limitations defines what is not feasible only for purpose of prescription or enforcement by EPA.

For the reasons discussed in our main brief, we believe that the Administrator always has had the authority to use work practice standards when necessary to carry out the congressional mandate to reduce the emission of hazardous air pollutants. The amendments to Section 112 of the Act clarify (and in some ways restrict) the Administrator's authority.[2] We submit that they demonstrate that the work practice regulation that petitioner is charged to have violated was authorized by statute and that the indictment therefore is proper even if, contrary to our submission, the Court should conclude that petitioner's arguments are maintainable at this late date.

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[2]The amendments to Section 112 refer to "emission standards" and "work practices" as distinct methods of regulation. Petitioner may argue that this demonstrates that the original version of Section 112, which spoke only of "emission standards," could not have authorized the asbestos regulation. This argument would be incorrect. It was necessary in the amended statute to distinguish between work practices and numerical limits in order to clarify the circumstances under which the Administrator could promulgate work practice regulations. Nothing in the legislative history indicates that Congress supposed that the Administrator lacked the power to promulgate work practices prior to the recent amendment; the legislative history discussed at Br. 32-33 n. 22 looks in the contrary direction.

For these reasons, as well as the reasons discussed in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

AUGUST 1977.

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*The Solicitor General is disqualified in this case.